ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)))	WT Docket No. 95-157 RM-8643

REPLY COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA") hereby submits its reply to the comments filed in response to the Federal Communications Commission's ("FCC" or "Commission") Further Notice of Proposed Rulemaking in the above-captioned docket.[1] For the reasons enumerated in its prior filings, PCIA recommends that the Commission eliminate voluntary negotiation periods for all PCS licensees to prevent abuses of the FCC's transition rules and resulting delays in the deployment of PCS. The Commission's rules requiring a comparable system with full cost compensation and a seamless transition will fully protect incumbents.

After reviewing the comments, PCIA also believes that serious practical questions have been raised about incumbent microwave participation in cost sharing. Moreover, the record does not yet reflect adequate proposed protections that could realistically substitute for actual negotiations between PCS providers and incumbents. Accordingly, the FCC should

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[1] First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 95-157 (Apr. 25, 1996)(hereinafter "First Report and Order").

act carefully to ensure that effective measures are in place prior to allowing incumbent participation.

I. THE VOLUNTARY NEGOTIATION PERIOD IS UNNECESSARY TO PROTECT INCUMBENT MICROWAVE LICENSEES

The record is clear that elimination, or shortening, of the voluntary negotiation period will affect only those incumbents who have sought to take advantage of that period for private enrichment. The FCC's relocation rules already guarantee an incumbent a comparable system, full cost compensation, and a seamless transition to the new facilities. The voluntary negotiation period adds only the opportunity to refuse to bargain with PCS providers, to thereby delay relocation, and, in turn, to extract premiums above actual relocation costs in exchange for accelerating the intentionally delayed process. PCIA does not understand why a Commission licensee should be given an opportunity not to bargain in good faith, to delay achievement of the public interest as determined by the FCC, and to profit from its government-granted free spectrum licenses at the expense of the public.

Nonetheless, some commenters have suggested that changing the rules now would somehow injure incumbents who have based their negotiation strategies on the current rules.[2] But, the only way in which elimination or shortening of the voluntary period could disrupt an incumbent's bargaining approach is to foreclose implementation of a strategy to leverage the voluntary period to secure premium payments from PCS providers. As the

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[2] See Comments of UTC, WT Docket No. 95-157 at 4-5 (filed May 28, 1996)(hereinafter "UTC Comments").

D.C. Circuit Court has indicated, that is not a cognizable injury.[3] Incumbents bargaining in good faith for a comparable system will not be affected at all.

One incumbent also suggests that the voluntary period is necessary to eliminate the possibility of a strain on public safety incumbents' resources.[4] However, the mandatory negotiation period rules only require that the parties negotiate and come to an agreement during that period, not complete relocation of the system. A two-year period (or three years for public safety incumbents) for negotiations is more than adequate to conclude even complex relocation negotiations and gives incumbents with limited resources time for a flexible negotiation schedule.

The need for sound relocation ground rules is particularly important because D-F block PCS licensees will be less able to work around an incumbent demanding exorbitant premiums given their smaller spectrum allocations (10 MHz rather than 30 MHz) and their smaller license areas (BTAs rather than MTAs).[5] In addition, C block licensees are by definition small entrepreneur companies without extensive funding. These licensees may be hard pressed to afford to pay huge premiums just to turn on their systems. PCIA therefore urges the FCC to eliminate or shorten the voluntary period for C-F block licensees to prevent

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[3] *Association of Public-Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395, 399 n.5 (D.C. Cir. 1996).

[4] Comments of the Los Angeles County Sheriff's Department and the County of Los Angeles, Internal Services Department, WT Docket No. 95-157 at 2-3 (filed May 28, 1996).

[5] See Comments of PCIA, WT Docket No. 95-157 at 3-4 (filed May 28, 1996).

demands for huge premiums over relocation costs from further delaying the deployment of PCS.

II. IF INCUMBENTS ARE TO PARTICIPATE IN COST SHARING, THE FCC MUST DEVELOP SIGNIFICANT PROTECTIONS SO THAT THE RELOCATION NEGOTIATION PROCESS IS NOT UNDERMINED

PCIA recognizes the possible benefits of incumbent participation in cost sharing, including facilitating relocation of multi-link networks. However, as explained in its comments, PCIA has identified a number of concerns that the Commission must address prior to allowing incumbents to relocate their own links. These include:

- The lack of any independent check on the comparability of the replacement system;
- The absence of assurance that costs for the installation of the new system were reasonable;
- The potential for an incumbent that relocates its system for its own business reasons to gain reimbursement to which it would not otherwise be entitled through cost sharing;[6]
- The ability of incumbents to circumvent the negotiation process -- which the FCC relies upon to minimize relocation costs -- by relocating their own links and avoiding negotiations with PCS providers;

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[6] Basin Electric suggests that incumbents in the 2 GHz band who have already relocated their own systems should be entitled to reimbursement through the cost sharing process. See Comments of Basin Electric Power Cooperative, WT Docket No. 95-157 at 4 (filed May 28, 1996). PCIA strongly opposes this proposal. The purpose of the relocation rules is to compensate those incumbents who are required to move as a result of the deployment of new technologies. An incumbent who has relocated voluntarily has done so for its own business reasons and is not entitled to compensation.

- The potential for reimbursement obligations to be imposed on PCS systems under the proximity threshold test where a relocation obligation could have been avoided by the lack of actual interference to an incumbent;
- The lack of incentives for incumbents to seek the best costs for equipment;
- The inability of later entrants to verify the comparability of the new system to the relocated system, particularly in regards to actual usage throughput; and
- The inevitable increase in the complexity and frequency of disputes because of the absence of relocation negotiations.

Some incumbents claim these concerns are eliminated or mitigated by other aspects of the cost sharing rules.[7] For example, they cite in support of their contentions such factors as the existence of cost sharing caps, the requirement of documentation of relocation expenses, limits on an incumbent's reimbursable expenses to the level of relocation costs incurred for links in a system relocated by a PCS provider, the fact that many incumbents are regulated utilities, and the absence of any guarantee of reimbursement. However, as detailed below, these aspects of cost sharing do not fully or effectively mitigate against adverse impacts.

PCIA submits that, although these factors may exert some discipline, they are inadequate to prevent incumbents from taking advantage of these opportunities to disadvantage PCS providers in the relocation process. For example, the $250,000 cap (plus $150,000 for new towers and tower modifications) established for cost sharing is higher than the expected costs of many relocations, and, consequently, it cannot perform the same

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[7] See, e.g., UTC Comments at 7-8; Comments of Santee Cooper, WT Docket No. 95-157 at 3-4 (filed May 28, 1996).

function as negotiations in minimizing relocation cost. While records and documentation are required, there is no practical way for a later PCS entrant to verify the comparability of an incumbent's new system without the ability to examine the original 2 GHz system, which would already have been dismantled and relocated. Moreover, once the system has been relocated, a later PCS entrant will have no independent check on how extensively the incumbent was actually using the system, which is critical to determining comparability of throughput usage.[8]

Similarly, it will only be possible to limit cost reimbursement of incumbent-relocated links to the costs of PCS provider-relocated links in the same system in those cases in which a PCS provider has already negotiated with an incumbent. As UTC noted, incumbents in rural areas may want to take advantage of relocating themselves prior to PCS entry into their area in order to have access to desirable spectrum in the higher bands,[9] leaving later PCS entrants without the ability to rely on any such independent check. Likewise, reliance on state oversight of utility incumbents will be possible only in limited circumstances and, in any event, there has been no showing that such regulation will have any impact on the concerns raised here. Indeed, some state affiliated or regulated incumbents have been among the most aggressive abusers of the existing rules.[10] Finally, some incumbents may relocate

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[8] First Report and Order at ¶ 29.

[9] UTC Comments at 6.

[10] See, e.g., Comments of PCIA, WT Docket No. 95-157 at Exhibit A (letter from Suffolk County Police Department demanding a new digital microwave system plus $18 million in order to complete negotiations "in a timely manner"), Exhibit B

(continued...)

themselves without the discipline imposed by the negotiation process, knowing that the PCS providers operating in their area will be required to compensate them later. API states that the risk of not receiving reimbursement for self-relocated links is a sufficient incentive for incumbents to minimize costs.[11] However, this risk will be virtually nonexistent for many incumbents such as those located in or near major urban areas.

Because the protections so far suggested by incumbents are inadequate to provide the independent check needed to take the place of relocation negotiations, PCIA remains concerned about the potential problems of incumbent participation in cost sharing. In particular, PCIA is concerned that participation of incumbents in cost sharing without an effective independent check on relocation costs will increase the number and exacerbate the complexity of disputes brought to the clearinghouse, thereby raising the costs of operation for the industry.

Two PCS licensees have suggested ways at least to minimize some of the potential for abuse of the cost sharing process by participating microwave incumbents.[12] For example, Primeco and Sprint recommend that if incumbents are allowed to participate in cost sharing, third party estimates of relocation costs should be obtained by the clearinghouse at the

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[10](...continued)
(City of San Diego contract for negotiation consulting services of $185,000) (filed Nov. 30, 1995).

[11] Comments of the American Petroleum Institute, WT Docket No. 95-157 at 13 (filed May 28, 1996).

[12] Comments of PrimeCo Personal Communications, L.P., WT Docket No. 95-157 at 6 (filed May 28, 1996); Comments of Sprint Spectrum L.P., WT Docket No. 95-157 at 5-6 (filed May 28, 1996).

incumbents' expense. PCIA submits that the FCC should as a minimum adopt these suggestions but will need to devise other measures as well to fully address the serious concerns identified herein.[13]

The Commission cannot assume that these problems will take care of themselves or that it can defer action until some later date. UTC states that many incumbents will participate in the cost sharing mechanism, if given the opportunity, making the development of safeguards of critical importance. Since other parties have not suggested adequate protections, the FCC must determine that such protections can be developed and implemented prior to allowing incumbent participation in cost sharing.

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[13] If incumbents are allowed to relocate their own links and obtain reimbursement through cost sharing, the reimbursement they are entitled to should begin to depreciate according to the cost sharing formula at the time they begin operating the relocated system. Since a self-relocating incumbent will receive the benefits of an early relocation, such as access to better frequencies, the reimbursement it receives should be depreciated in the same way that the reimbursement a PCS relocator receives is depreciated.

III. CONCLUSION

For the foregoing reasons, PCIA urges the Commission to eliminate or shorten the voluntary negotiation for C-F block PCS licensees and to carefully consider whether the problems with microwave incumbent participation in cost sharing that PCIA has identified can be solved.

Respectfully submitted,

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